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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

Comments of Bell Atlantic
on Third Further Notice of Proposed Rulemaking

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December 16, 1994

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A. Introduction and Summary

In its Order on reconsideration of the video dialtone rules, the Commission identified several issues with respect to which it is considering further regulatory changes. The Commission should promptly resolve the issues raised in this further rulemaking in order to permit the expeditious deployment of video dialtone networks that will finally provide long-awaited competition to the cable industry. In so doing, the Commission should adopt rules that will not stifle the development of new technologies and services, and will give the video dialtone

[1] The Bell Atlantic Telephone Companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., and Bell Atlantic-West Virginia, Inc.

industry sufficient flexibility to respond effectively and competitively to market forces.

First, the Commission should remain steadfast in its commitment not to mandate use of any particular video dialtone architecture or technology. From a business standpoint, some programming will continue to be available only in analog form for the short term, and mandating all-digital networks in every instance could result in increased costs for video dialtone service. From a policy standpoint, requiring deployment of all-digital video dialtone networks would substantially undercut the public policy objective underlying the 1992 Cable Act's requirement that consumers be able to receive basic local video programming without use of a set top converter box, and could deprive consumers of access to local programming until local programmers begin delivering their signals in digital form. Conversely, mandating expandable analog capacity would substantially diminish the overall capacity of video dialtone systems -- limiting the number and types of programming and other information services that may be offered over the systems and delaying introduction of innovative interactive broadband services, or substantially increase the costs of the network by requiring additional analog capacity.

Second, the Commission should authorize voluntary preferential access arrangements, such as Bell Atlantic's "will carry" proposal, in order to further the substantial Federal interest in promoting the continued viability and universal availability of local over-the-air broadcast and PEG programming,[2] and to promote efficient utilization of network capacity. The Commission also should approve other reasonable channel sharing proposals that would not require adding costly interdiction capabilities to the network.

Finally, regulatory authorities have adequate existing authority to ensure that cable operators have access at reasonable rates to telephone company poles and conduits. Requiring video dialtone providers to demonstrate that such access is available in each Section 214 application would be an empty formality.

B. The Commission Should Not Mandate a Particular Architecture or Technology for Video Dialtone Systems

In order to encourage technological innovation and provide maximum flexibility for video dialtone providers, the Commission has declined,[3] and should continue to decline, to mandate a particular architecture or technology for video dialtone systems. Rather than requiring deployment of all-digital video dialtone networks, the Commission should permit video dialtone providers to limit the amount of analog capacity offered, as a necessary transitional measure until market forces naturally lead to all-digital networks.

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2 See Turner Broadcasting System, Inc. v. Federal Communications Commission, 114 S.Ct. 2445, 2469-70 (1994); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984).

3 Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 FCC Rcd 5781, 5805 n.104 (1992) ("Video Dialtone Order").

The video industry is slowly but inexorably following the lead of the telecommunications industry in choosing digital over analog technologies. Cable operators are investing heavily in digital production and delivery facilities,[4] national broadcast networks are experimenting with digital signal delivery,[5] and a new industry -- direct broadcast satellite ("DBS") systems -- has been launched to deliver compressed digital video signals directly to consumers by satellite.[6]

Bell Atlantic has been using digital compression technologies in its technical trial of asymmetric digital subscriber line ("ADSL") technology in Northern Virginia for over a year. Bell Atlantic has also successfully completed a technical trial of fiber-to-the-curb digital transport facilities in Loudoun

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[4] See, e.g., "Cablevision to Offer Digital Services Using AT&T Technology," Telecommunications Reports, Dec. 12, 1994, at 29; Jon Van, "Cable-TV Center Sees Future," Chicago Tribune, May 23, 1994, at C1 (TCI opens $100 million National Digital Television Center in Denver to digitize and compress video programming); Dave Gussow, "Galleries Embrace Future Bit By Bit," St. Petersburg Times, June 27, 1994, at 8 (TCI, Time Warner and Sega to introduce a digital video game channel nationwide); Paul Farhi, "Interactive in Orlando," The Washington Post, Dec. 13, 1994, at 1 (Time Warner to begin test of interactive network in Orlando).

[5] Chris McConnell, "CBS Picks H-P for its Tapeless Debut; Hewlett-Packard Broadcast Video Server," Broadcasting and Cable, Aug. 15, 1994, at 43 (network orders digital video server for Miami station).

[6] See "Primestar Rolls Out Digital Satellite TV Service," Reuters, Mar. 22, 1994 (Primestar Partners providing 77 channels of digitally-delivered home television service); Charles Haddad, "Two Satellite-to-Home TV Services Start Next Week," The Atlanta Journal and Constitution, Oct. 20, 1994, at F1 (DirecTV and USSB complete nationwide rollout); Doug Abrahms, "DirecTV Digs in While Phone Firms Fight on Hill to Carry TV Programs," The Washington Times, Oct. 19, 1994, at B7 (DBS alternative to cable service available coast to coast).

County, Virginia[7], and is currently completing laboratory testing of the digital equipment required for its Dover Township, New Jersey fiber-to-the-curb network. The digital technology and equipment required to support Bell Atlantic's hybrid fiber-coaxial cable systems are either currently available or are expected to be available within the timeframe required to meet Bell Atlantic's deployment plans.[8]

The reasons for the trend toward digital technology are simple: digital signals are capable of providing much better picture quality than analog signals;[9] digital compression and switching techniques permit more efficient spectrum utilization, permitting dynamic allocation of bandwidth[10] and providing

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[7] See Application of The Chesapeake and Potomac Tel. Co., Application, W-P-C 6649 (June 16, 1993) at 2.

[8] See Application of the Bell Atlantic Tel. Cos., W-P-C 6966, Application at Exhibit 3, Declaration of Raymond F. Albers, Vice President - Technology Planning, Bell Atlantic Network Services, Inc. (Aug. 11, 1994) at ¶ 7.

[9] With analog signals, the picture itself is transported across significant distances, which may add noise, unintended images or other distortions. In contrast, digital signals are transported across the network as symbols -- 1s and 0s, not as actual pictures. So long as there is adequate signal performance to discern 1s from 0s, the picture can be accurately produced in the set top box on the end user's premises, resulting in a sharper picture image. Bell Atlantic has utilized similar digital transport technologies to provide telephony services for over ten years.

[10] Instead of delivering a fixed 6 MHz signal at all times, digital systems will have a future capability of delivering to the same subscriber a 1.5 Mbps signal for one program or service, and a 6.0 Mbps signal for the next program or servivce, depending upon the bandwidth requirements of the particular content being delivered.

substantially greater capacity from the same amount of bandwidth;[11] and the more robust upstream signalling capability of digital systems is required to support the innovative interactive applications consumers seek, such as true video on demand, home shopping, banking and other transactions, distance learning, and other educational, informational or health-related services.

While developments such as the international MPEG-2 standard for video compression will likely accelerate the pace of digital conversion, the transition to an all-digital world will not happen overnight. Switching to digital technology will require additional capital outlays for equipment to digitally encode video signals. Such costs may be more easily absorbed if phased-in over time, especially by small public interest programmers such as public, educational and governmental ("PEG") programmers and local over-the-air broadcast stations.

In addition, the approximately 93.6 million households with televisions today[12] have analog sets, which require use of a set-top decoder to convert a digitally-delivered signal to analog

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[11] For example, each carrier on an analog broadband network is typically one 6 MHz analog signal. But with the use of advanced digital compression techniques, the same carrier can accommodate up to four 6.[illegible] Mbps digital signals, eight 3.0 Mbps digital signals, or sixteen 1.5 Mbps digital signals. Similarly, digital asynchronous transfer mode switches permit simultaneous delivery of multiple packets of information or content over the same transport paths to different end user subscribers at different times, without the need for a dedicated physical transport path from a video provider to each customer.

[12] Kagan & Associates, <u>1993 Cable Television Financial Data Book</u> at 7 (June 1993).

format for viewing.[13] Mandating construction of all-digital networks would force consumers to absorb some or all of the additional costs of a set-top decoder for each television set connected to the network.[14] Requiring a set top box in order to obtain any programming over a video dialtone network would also undermine the public policy objective underlying the 1992 Cable Act's requirement that consumers with cable-ready televisions should be able to access the "basic tier" of cable programming without a set top converter. If consumers cannot receive comparable service over a video dialtone network, video dialtone providers and their programmer-customers will be at a competitive disadvantage in seeking to attract subscribers.

On the other hand, requiring unlimited expansion of analog capacity on video dialtone networks would significantly reduce the overall capacity of these new broadband networks,[15] slow

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[13] See Telephone Company-Cable Television Cross-Ownership Rules, CC 87-266, Mem. Op. & Ord. on Reconsideration and 3rd Notice of Proposed Rulemaking, at ¶ 268 (rel. Nov. 9, 1994) ("Reconsideration Order").

[14] The portion of the cost of the set-top box requirement directly absorbed by an individual consumer may vary depending upon how the box is provided. If purchased outright by the consumer, the full cost would be borne by the individual consumer from the start. Alternatively, the programmer-customer or a third-party vendor of customer premises equipment might lease such boxes to consumers and recover its costs over time.

[15] A 750 MHz system could carry a maximum of 110 analog channels, but could carry more than 1600 digital channels. A predominantly digital system would still have sufficient capacity to serve multiple programmer-customers. See, e.g., New Jersey Bell, W-P-C 6840, Order and Authorization (rel. July 18, 1994) at ¶14 (system with 384 digital channels and no analog capacity held sufficient to meet current anticipated demand for video dialtone transport).

the development and introduction of innovative digital services, and force video dialtone providers to attempt to enter markets dominated by large cable incumbents only with standard analog broadcast programming -- a product that consumers may view as merely duplicative of current cable offerings.

The Commission should therefore allow local exchange carriers to deploy video dialtone networks using the type of architecture and technology that each carrier believes best meets market and customer requirements, so long as such networks meet the fundamental video dialtone requirement that the system must provide adequate capacity to accommodate multiple programmer-customers.

C. The Commission Should Authorize Preferential Access for Local Broadcasters and Public, Educational and Governmental Programmers.

For the reasons described above, Bell Atlantic has proposed to construct video dialtone platforms in six major markets using a hybrid fiber-coaxial cable architecture that is primarily digital, with a finite amount of capacity reserved for analog transport. Bell Atlantic has proposed an innovative approach to use of the analog spectrum on these platforms -- its "will carry" proposal. Under this proposal, Bell Atlantic will voluntarily provide analog capacity without charge to local broadcasters and PEG programmers. These channels will be delivered in the clear to every household connected to these systems, and can be viewed on any cable-ready television set without the need for a set top box.

Bell Atlantic itself will play no role in selecting the signals that are carried on the will carry channels.[16] Instead, Bell Atlantic will merely make analog transport capacity available for use by those local over-the-air broadcast stations that qualify for carriage under criteria based on those governing "must carry" requirements for cable operators and for use by local authorities to provide up to four channels of PEG programming. The programmers themselves will determine whether they wish to provide their signals over these channels.

Because these signals are not scrambled or interdicted, each programmer-customer on Bell Atlantic's network will be able to offer its end user subscribers a package that automatically includes these channels.[17] As a result, no programmer-customer

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[16] Bell Atlantic's will carry proposal does not require any entity to structure or administer use of the analog channels, thereby obviating the need to identify criteria for selecting an administrator or determining how that administrator will select programming.

[17] Because it is not economically feasible to interdict the analog channels, see infra at 12, "will carry" would not be viable if Bell Atlantic were required to charge qualifying local broadcasters and PEG programmers even for its incremental costs of providing channel capacity to such programmers. Such programmers would not be able to recoup from end user subscribers the cost of those transport charges. If an end user subscriber refused to pay the programmer for its service, that programmer could not terminate service to the non-paying subscriber without also terminating service to all other subscribers on Bell Atlantic's video dialtone network.

The universal availability of this popular, public interest programming benefits all end user subscribers. It also benefits all programmer-customers offering service over Bell Atlantic's video dialtone network by allowing each programmer to offer a more robust programming package, increasing the (continued. . .)

will be at a competitive disadvantage because each can offer its customers, as part of its own unique programming offering, the type of programming that they are used to receiving without a set top box.[18]

In connection with the Commission's reconsideration of the video dialtone rules, Bell Atlantic provided the Commission with a legal and public policy analysis of its "will carry" proposal, addressing the very issues on which the Commission seeks comment in this rulemaking proceeding. That analysis, attached as Exhibit A and incorporated by reference, demonstrates that Bell Atlantic's "will carry" proposal would further the substantial Federal interest in ensuring the continued viability and universal availability of local over-the-air commercial and educational broadcast stations and other local public interest programming. It also demonstrates that "will carry" is consistent with the Commission's classification of video dialtone as a common carrier service regulated under Title II of the Communications Act of 1934,

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(footnote 17 continued. . .)
attractiveness of its service. It is therefore not inappropriate for Bell Atlantic to recover the costs of providing this transport without charge to qualified broadcasters and PEG programmers in the basic network connection and transport rates it charges all other video dialtone system customers.

[18] The universal availability of these common channels will enhance the service offerings of small niche programmer-customers, making their services more attractive to end-user subscribers and encouraging their viability.

is permitted under Sections 201(b) and 202(a) of the Act[19], and avoids the First Amendment concerns that have been raised with respect to the mandatory carriage scheme that applies to cable operators.

D. The Commission Should Approve Reasonable Channel Sharing Proposals That Do Not Require Interdiction Capabilities.

Bell Atlantic also supports other channel sharing proposals that seek to provide common channels of programming, so long as the Commission's approval of such proposals is not premised on the existence of costly network interdiction capabilities.

Bell Atlantic supports the Commission's tentative conclusion that "channel sharing mechanisms, if properly structured, can offer significant benefits to consumers, programmer-customers and video dialtone providers..." by increasing the number of video programmers on the platform, maximizing use of the platform by customers, and enabling multiple subscribers to offer full service packages to consumers,[20] and strongly supports the Commission's decision not to prescribe one kind of channel sharing arrangement for all video dialtone platforms.[21]

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19 As the cable industry itself has acknowledged, analog and digital transport are not "like" services. See Application of The Bell Atlantic Tel Cos., W-P-C 6834, 6838, 6912, and 6966, Consolidated Reply of the National Cable Television Association, Inc. (Dec. 6, 1994) at 16.

20 Reconsideration Order at ¶ 274.

21 See id. at ¶ 275. The legal and public policy analysis supporting Bell Atlantic's channel sharing proposal -- "will carry" -- is addressed supra at Section C.

The Commission should be aware, however, that any channel sharing mechanism that requires an administrator to recoup its costs of providing the shared channels through charges to programmer-customers would require that the network have costly interdiction capabilities in order to avoid a "free rider" problem. Without interdiction, the shared channels would be available automatically to each programmer-customer's end user subscribers whether or not that programmer-customer had paid the administrator the required charge. The administrator could not terminate service to the "free rider" programmer's subscribers without terminating delivery of the shared channel signals to all end user subscribers on the network. Providing interdiction capability in the network would add substantially to the cost of the network -- at least $150 per subscriber.[22] This additional investment would drive up the cost and, consequently, the price of video dialtone service to subscribers.

In order to avoid imposition of an interdiction requirement without undercutting the viability of channel sharing by triggering the free rider problem, the Commission should permit the shared channel administrator to recoup its costs through the network's tariffed charges to programmer-customers. The network could bill all programmer-customers on the network a charge that collectively covers the administrator's costs, which the network would collect and remit to the administrator. Alternatively, the

[22] These figures are based on discussions with vendors of the cost of such network interdiction capabilities.

Commission could allow the network to compensate the administrator directly for its costs and include such costs in the network's other tariffed charges.

E. Extending the Channel Service Pole Attachment Certification Requirement to Video Dialtone Service Would Serve No Useful Purpose.

Requiring video dialtone platform providers to demonstrate that video programmers using the system had available pole attachment and conduit rights at reasonable rates and without imposition of unnecessary restrictions would serve no useful purpose.

The Commission already has authority under the Pole Attachment Act to regulate the rates, terms and conditions for pole attachments offered to cable operators by common carriers, if state authorities choose not to do so.[23] Because regulatory authorities can already ensure that rates for pole or conduit access granted by Bell Atlantic are reasonable and no undue restrictions are imposed, it would be an empty formality to require each local exchange carrier to restate cable operators' existing legal rights.[24]

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[23] 47 U.S.C. § 224.

[24] Whether the rates charged and conditions imposed by a carrier are indeed reasonable are appropriately addressed in separate administrative proceedings, not in the Section 214 application process.

In light of the cable industry's concession "that access to utility poles does not in itself constitute a problem,"[25] the Pole Attachment Act requires only nondiscriminatory pricing for pole attachments and does not by its terms mandate access to carriers' poles and conduits in all circumstances.[26] The Commission, however, has asserted that it has authority to take appropriate action to ensure access if such access is wrongfully denied.[27] A showing that such access has been made available simply adds another administrative burden to the already cumbersome Section 214 application process.[28]

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[25] S. Rep. No. 580, 95th Cong., 2d Sess. 16 (1978). In contrast to cable operators purchasing channel service, many programmer-customers of video dialtone networks may well be small, niche programmers. For these smaller players, facilities-based competition is not a viable economic alternative. As a result, the availability of pole or conduit access is not an issue for these programmers.

[26] In fact, the Commission's channel service regulations require a carrier to demonstrate only that the channel service customer had available pole attachment rights or conduit space "within the limitations of technical feasibility." 47 C.F.R. § 63.57.

[27] See Video Dialtone Order at ¶¶ 81, 95 (declining to adopt the Department of Justice's suggestion that video dialtone authorization be conditioned on mandatory access provisions, on grounds that telephone companies "continue to be subject to [FCC's] authority under the Pole Attachment Act); see also Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, 3 FCC Rcd 5849, 5871 n.16 (1988).

[28] Any potential video dialtone programmer-customer that believes it has been wrongfully denied access could raise that issue when commenting on the pending Section 214 application.

F. Conclusion

For the reasons outlined above, the Commission should decline to mandate construction of all-digital video dialtone networks. Instead the Commission should permit video dialtone providers voluntarily to provide a limited amount of analog capacity as a necessary transitional mechanism if, in their view, market forces so require.

The Commission should amend the video dialtone rules to permit local over-the-air broadcasters and PEG programmers to obtain transport over Bell Atlantic's video dialtone networks under the terms of its "will carry" proposal, and to authorize other arrangements for shared use of limited analog capacity that do not require network interdiction capabilities. Finally, the Commission should not extend the pole attachment requirements applicable to channel service to video dialtone service.

Respectfully submitted,

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December 16, 1994

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EXHIBIT A

Bell Atlantic

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Marie T. Breslin
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October 3, 1994

EX PARTE

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Caton:

Re: CC Docket 87-266, Video Dialtone Petitions for Reconsideration, W-P-C 6912 and W-P-C 6966

Attached is a written ex parte which responds to questions raised by Commission staff concerning Bell Atlantic's "will carry" proposal.

Please include this correspondence as part of the public record in the above captioned proceedings. Please call me if you have any questions regarding this filing.

Sincerely,

Marie Breslin

Attachment

cc: K. Brinkmann
R. Baca
J. Casserly
J. Coltharp
R. Welch
K. Wallman
K. Levitz
A. R. Metzger
J. Schlichting
G. Lipscomb

BELL ATLANTIC'S "WILL CARRY" PROPOSAL

I. BACKGROUND

* In its 1992 order on video dialtone, the Commission declined to adopt rules providing for free or reduced rate carriage on video dialtone systems for local broadcasters or other public interest programmers. In the ongoing reconsideration proceedings, however, the Commission has been asked by representatives of the local broadcast industry to reconsider this aspect of its rules.

* In addition, Bell Atlantic has introduced an innovative "will carry" proposal in a pair of recent video dialtone applications under which it voluntarily will provide analog capacity on the proposed systems without charge to local broadcasters and to public, educational and governmental (PEG) programmers. These channels will be delivered in the clear to every household connected to these systems, and can be viewed on any cable ready TV without the need for a set top box.

* Under this proposal, Bell Atlantic will play no role in selecting the signals that are carried on the will carry channels. Instead, it merely will make analog transport capacity available for use by those local broadcasters that qualify for "will carry" status under criteria based on those governing "must carry" requirements for cable system operators, and for use by local governments to provide up to four channels of PEG programming. The programmers themselves will decide whether or not to place their signals on these channels.

* In order for will carry to be implemented, Bell Atlantic has joined the broadcast industry in asking the Commission to reconsider its video dialtone rules to the extent necessary to allow this proposal to be adopted.

II. PUBLIC POLICY ANALYSIS

* Since the video dialtone order was adopted, several events have occurred that warrant reconsideration. In particular, one month after the video dialtone order was released, Congress passed the Cable Act of 1992 which incorporated major changes in public policy concerning the carriage of local broadcast and public interest programming. Although the 1992 Act does not apply to video dialtone, the public policy objectives that underlie the Act remain relevant.

* First, Congress in the 1992 Act imposed "must carry" obligations on cable operators that mandate the carriage of local broadcast stations without charge to the broadcasters. Congress did so based on its conclusion that this was necessary to ensure the continued viability and universal availability of local over-the-air commercial and educational broadcast stations. The Commission has since adopted rules implementing this public policy directive.

* Second, Congress directed the Commission to adopt rules designed to promote the availability to consumers with cable-ready TVs of at least some basic

programming without the need for a set-top box. In response, the Commission has adopted rules to promote the delivery by cable operators of the most basic package of analog programming, which includes local broadcast channels electing must carry status and PEG channels, without the need for a set top box.

* Moreover, in the two years since the video dialtone order, there has been widespread recognition that the future of the industry is digital, and that digital transmission networks will deliver more capacity and greater capabilities than is possible with older analog technologies. As a result, promoting the rapid development of digital technologies strongly serves the public interest.

* Significantly, Bell Atlantic's will carry proposal promotes each of these public policy interests. By ensuring that local broadcasters and other public interest programmers can obtain analog carriage without charge, it will promote the continued viability and universal availability of these forms of programming. By delivering these channels in the clear, it will make this programming available to consumers with cable-ready TVs without the need for a set top box. By limiting the use of analog capacity to unique classes of customers, it will accelerate movement toward an all digital future. And because 4-16 digital channels are lost for every analog channel provided, limiting the amount of analog capacity also will maximize the overall capacity of the network for use by a diverse range of programmers.

III. LEGAL ANALYSIS

* The will carry proposal is consistent with the Commission's classification of video dialtone as a common carrier service regulated under Title II. Nevertheless, the cable industry has tried to block the implementation of a will carry policy by claiming it would violate the Communications Act of 1934, and more specifically section 202(a) of the Act. This claim is wrong.

* Specifically, section 202(a) proscribes only "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications services..." 47 U.S.C. § 202(a). Bell Atlantic's will carry proposal does not run afoul of this provision for three separate reasons.

* First, Bell Atlantic's will carry proposal merely creates a unique tariff classification for a distinct class of customers as is expressly allowed under a separate provision of the statute, section 201(b). As a result, it is not necessary even to reach any issues with respect to section 202(a). Second, section 202(a) itself proscribes discrimination only with respect to "like" services, but the analog will carry channels at issue here are not functionally "like" the other, digital services that Bell Atlantic will provide on its video dialtone systems. Third, even for services that are like, section 202(a) proscribes only "unjust or unreasonable" discrimination. But providing analog transport without charge to broadcasters and

PEG programmers during the transition to digital technologies will affirmatively promote Congressional objectives, and is in no sense unreasonable. In addition, because Bell Atlantic's will carry proposal is voluntary, it presents none of the constitutional concerns that have been raised with respect to the mandatory carriage scheme that applies to cable operators.

A. Will Carry Is Permitted Under Section 201(b)

* Bell Atlantic's will carry proposal would create a unique tariff classification for service to local over-the-air broadcasters and originators of other local programming. This is expressly permitted under section 201(b) of the Communications Act which provides that "communications by wire...may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable." 47 U.S.C. § 201(b).

* Here, the classification proposed by Bell Atlantic is "just and reasonable" on its face. In fact, Congress itself concluded in passing the 1992 Cable Act that local broadcasters are a unique class of programmers deserving special treatment. As a result, Congress mandated that local broadcast signals be carried on cable systems without charge based on its conclusion that the continued viability and universal availability of local broadcast television would be jeopardized if broadcasters could not secure carriage on cable systems. Significantly, the Supreme Court has since agreed that "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems" is an "important and substantial federal interest." Turner Broadcasting System v. FCC, 114 S.Ct. 2445, 2461 (1994) (citation omitted).

* In light of this substantial governmental interest, the same analysis that led Congress and the Commission to treat local broadcasters as a unique class and provide for free carriage on cable systems also justifies allowing voluntary arrangements to provide preferential carriage for these programmers on video dialtone systems. Specifically, by providing analog transport to local broadcast and PEG programmers without charge, Bell Atlantic's will carry proposal will ensure that these programmers can continue to reach all households connected to Bell Atlantic's network. And doing so will promote the continued viability and universal availability of these programmers during the transition to all digital technologies.

* Moreover, the types of public interest concerns at issue here are not unlike those that have provided a basis for other classifications. In fact, the Commission has previously approved special tariff classifications for services to the Federal Government that are not available to other customers. To cite one example, the Telecommunications Service Priority System provides priority provisioning and restoration of telecommunications services only for Federal Government agencies,

state emergency operations centers, and certain other authorized users. See Bell Atlantic's Tariff FCC No. 1, Access Service, Section 10.8.

* In contrast, in cases where the Commission has declined to create special classifications, there has been no special public interest need supporting such classifications. For example, in Copley Press v. FCC, 444 F.2d 984 (D.C. Cir. 1971), the Commission declined to provide members of the press with more advantageous rates for private line service than other commercial customers. It did so, however, based on its conclusion that the press had failed to show that there would be "significant impairment of the widespread dissemination of news" if they were not given special press rates. Id. at 990. Here, in contrast, both Congress and the Commission have concluded that preferential treatment is warranted to preserve the universal availability of local broadcast and public interest programming.

B. Will Carry Is Permitted Under Section 202(a)

* Bell Atlantic's will carry proposal also satisfies section 202(a) of the Act. Under Section 202(a), "[a] charge that a carrier has discriminated in violation of this section entails a three-step inquiry: (1) whether the services are 'like;' (2) if they are 'like,' whether there is a price difference; and (3) if there is a difference, whether it is reasonable." MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990); AT&T Communications Revisions to Tariff FCC No. 12, 6 FCC Rcd 7039, 7041 (1991). Here, Bell Atlantic's will carry proposal satisfies this test both because the analog will carry channels are not "like" the other, digital services that will be provided on its video dialtone system, and also because the price difference is reasonable.

1. Will Carry Channels Are Not "Like" Other Services

* The analog transport capacity that Bell Atlantic proposes to offer "will carry" programmers is in no sense "like" the other services that it will offer over its video dialtone systems. These other services include digital transport for broadcast services and for two-way interactive services.

* The appropriate legal standard for determining whether two services are "like" is the "functional equivalence" test. Under this test, the Commission must determine, based on the nature of the services provided and customers' perceptions of the cross-elasticity of the two services, whether the allegedly like services are "different in any material functional respect." See Investigation of Special Access Tariffs of Local Exchange Carriers, 8 FCC Rcd 1059, 1062 (1993). Here, the analog will carry channels differ from the other services offered on the system both in terms of the technical nature of the services and in terms of the uses to which they can be put.

* Although both the analog will carry channels and the digital transport services carry video signals, it is there that the similarity ends and important functional differences between the services from the customers point of view begin.

-- From a technical standpoint, these differences include the fact that digital signals are less susceptible to degradation by noise and other interference, thus ensuring delivery of a higher quality signal. In addition, digital compression techniques permit delivery of signals of varying bandwidth, maximizing the number of channels or signals a programmer-customer may deliver at the lowest cost; analog delivery requires an unvarying 6.0 MHz of bandwidth. Also, the delivery of digital signals currently requires a set top decoder to decompress and convert the digital signal to analog form for viewing on a cable-ready television; analog signals, in contrast, can be delivered "in the clear," without the need for a set top decoder.

-- From the standpoint of the uses to which these services can be put, there also are significant differences. Because the analog channels will be delivered in the clear to every subscriber on the system, there is no way for the programmers using these channels to charge consumers to receive their services. Once a household is connected to the network, it automatically will receive all programming signals carried on the will carry channels; it cannot be blocked from receiving any particular will carry channel whether or not it paid the programmer to receive that signal. As a result, these channels cannot reasonably be used to deliver subscription programming services. In addition, the analog will carry channels are suitable only for one-way broadcast transmissions; any two-way or high-level interactive services can only be delivered over the digital services.

* As a result of these significant differences, the analog will carry channels and the other, digital services are not interchangeable or fungible services. They have material functional differences that preclude a finding of "likeness."

2. The Price Difference Between Will Carry Channels <u>And Other Services Is Not Unreasonable</u>

* Bell Atlantic's will carry proposal also satisfies section 202(a) because the price difference between the will carry channels and other services is not unreasonable.

* "Section 202(a) does not forbid all discrimination among 'like' services, only that which is 'unjust or unreasonable.' For example, otherwise discriminatory rates may be justified by considerations such as differences in costs, or the fact that they serve the goals of the Act, as in cases where a discriminatory rate is permitted temporarily as part of a transition mechanism." Id. at 1079; see also, National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095, 1135-36 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985); Western Union Tel. Co. v. FCC, 815 F.2d 1495, 1505 (D.C. Cir. 1987).

* Here, the price difference between the will carry channels and other services provided on the video dialtone system is justified both because it is an interim measure that ensures the continued viability of local over-the-air broadcasters until they make the transition to digital technology, and also because by doing so it affirmatively promotes the goals expressed by Congress. This conclusion also is supported by the Commission's previous applications of these principles.

* For example, the Commission has previously held that a discriminatory rate structure may be just and reasonable as a transition mechanism even for an extended period of time under "unique circumstances." See Investigation of Special Access Tariffs, 8 FCC Rcd at 1079 (discriminatory rates for Shared Network Facilities Arrangements between RBOCs and AT&T for eight years deemed "reasonable" due to circumstances arising from divestiture).

* Moreover, a discriminatory rate structure of indefinite duration may also be just and reasonable on public policy grounds, where it furthers the goals of the Communications Act. See, e.g., Bell Atlantic Tariff FCC No. 1, Section 4.1.6(L)(authorizing reduction by 100% of subscriber line charges for local residential customers who receive "Lifeline" or reduced rate local service due to limited economic means); see also, Bell Atlantic Tariff FCC No. 1, Section 17.3(A)(3) (authorizing discount of 5%-25% from usual special access rates for services to carriers providing the Federal Government's FTS-2000 service in order to permit such carriers to meet their contractual obligations and permit competitive bidding by Bell Atlantic at rates other carriers may offer). Likewise, Bell Atlantic's will carry proposal is justified on public policy grounds regardless of the duration of the service offering and regardless of the technology over which it is provided.

C. Will Carry Avoids Constitutional Concerns

* Finally, Bell Atlantic's will carry proposal avoids the First Amendment concerns that have been raised with respect to the mandatory carriage scheme that applies to cable operators. While the must carry rules initially were upheld by a divided three judge district court, that decision has since been vacated and remanded for additional fact-finding. See Turner Broadcasting System v. FCC, 114 S.Ct. 2445 (1994). As a result, the constitutional status of mandatory carriage schemes remains unsettled.

* Bell Atlantic's will carry proposal, however, is a voluntary undertaking that does not involve the government in mandating speech. As a result, it does not present the First Amendment issues that have been raised with respect to must carry. Nor would the mere fact the Commission allowed will carry to be adopted present constitutional concerns. See Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (action taken by a public utility under an approved tariff does not constitute state action). As a result, Bell Atlantic's will carry proposal passes constitutional, as well as statutory, muster.